



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Divorce Cause 7 of 2004**

**AA ..... PETITIONER**

**VERSUS**

**MH ..... RESPONDENT**

**RULING**

The parties herein had married on 1<sup>st</sup> April, 1998 and the said marriage was dissolved on 12<sup>th</sup> July, 2008 by a decree nisi.

The issue of maintenance and settlement of the property was finalized by a consent order of the same date.

Thereafter several applications were filed in respect of the said consent order.

The Respondent/wife (referred to as Respondent) filed two applications, namely:-

- 1. Chamber summons dated 10<sup>th</sup> March, 2008 seeking order of committal of the respondent to the civil jail for failing to pay arrears of maintenance amounting to US\$.223,723, to provide medical cover. It also sought for living expense and legal expense as the Respondent/Applicant had to remain in Kenya due to aforesaid failures from the Petitioner/Respondent. She seeks monthly expense of Shs.375,000/-.**
- 2. Chamber summons dated 26<sup>th</sup> March, 2008 filed under certificate of urgency seeking orders inter alia to direct the Petitioner/Respondent to surrender his passport to the court.**

However, the husband/Petitioner (referred to as the Petitioner) had earlier filed a Notice of Motion dated 10<sup>th</sup> October, 2007 filed on 1<sup>st</sup> November, 2007 to review the Decree extracted and issued on 23<sup>rd</sup> August, 2007.

It was ordered by court on 10<sup>th</sup> April, 2008 that all the aforesaid applications be heard together.

Voluminous affidavits are filed by the parties, in support and opposition of these applications. It shall be appropriate if I mention them at this stage.

The Petitioner has filed the following affidavits:

- (i) Affidavit in support to his Notice of Motion dated 10<sup>th</sup> October, 2007 sworn on 10<sup>th</sup> October,**

2007.

**(ii) Replying affidavit to the Chamber summons dated 10<sup>th</sup> March, 2008 sworn on 7<sup>th</sup> April, 2008 and filed on the same date.**

**(iii) Affidavit in response to the further affidavit of the Respondent sworn on 25<sup>th</sup> April, 2008 and filed on 5<sup>th</sup> May, 2008.**

**(iv) Replying affidavit sworn on 8<sup>th</sup> April, 2008 and filed on 15<sup>th</sup> April, 2008.**

**(v) Affidavit sworn on 11<sup>th</sup> August, 2008.**

**(vi) Affidavit sworn on 17<sup>th</sup> October, 2008 filed on 22<sup>nd</sup> October, 2008.**

Over and above the above mentioned affidavits the Petitioner has also filed grounds of opposition dated 9<sup>th</sup> April, 2008 in opposition to the Respondent's application dated 26<sup>th</sup> March, 2008.

The Respondent filed following affidavits.

**(i) Affidavit in support of Chamber Summons dated 10<sup>th</sup> March, 2008 sworn on the same day.**

**(ii) Supporting affidavit to Chamber Summons dated 26<sup>th</sup> March, 2008 sworn on the same day.**

**(iii) Replying affidavit to the Notice of Motion dated 10<sup>th</sup> October, 2007 sworn on 21<sup>st</sup> January 2008 and filed on the same day.**

**(iv) Further affidavit sworn on 24<sup>th</sup> April, 2008 and filed on the same date.**

**(v) Further affidavit sworn on 23<sup>rd</sup> July, 2008 and filed on the same date.**

**(vi) Replying affidavit sworn on 12<sup>th</sup> November, 2008 and filed on the same day.**

It was agreed by the counsel that the Petitioner's application shall be heard first by his counsel opening the submissions.

Before I embark to deal with the merits of the applications, I do need to note that the consent which was recorded is not denied to have been so recorded by any party and it is also common ground that the said consent also included the settlement on H.C.C.S. No.17/05 (O.S) which was for the distribution of the matrimonial properties.

In any event, it shall be necessary to quote the relevant parts of the consent on record which is annexed to the applications from both parties;

**“2. THAT the following consent presented to this Honourable Court on 12<sup>th</sup> July,**

**2007 be and is hereby adopted by this Honourable Court:-**

1. That the term “Petitioner” will refer to AA [particulars of name withheld] while the term “Respondent” will refer to MH [particulars of name withheld] for purpose of this consent.

2. That all and every term of this maintenance and matrimonial property division consent is to take effect from the date of a grant of a judgment dissolving the marriage in D.C. Cause No.[.....]aforesaid and thereafter on such dates as are set out in the respective terms of the consent.

3. That both parties have agreed, that subject to 2 above the Petitioner shall pay the Respondent an equivalent of Four Hundred Thousand United States Dollars (USD 400,000.00) in full and final settlement of any claim the Respondent would have against the Petitioner, including claims of maintenance and sub-division of matrimonial properties on the following terms.
4. USD.100,000.00 to be paid within 30 days of the divorce judgment.
5. USD.110,000.00 to be paid before the expiry of Ninety (90) days of the divorce judgment.
6. That uSD.90,000 to be paid from the Petitioner's share of the proceeds of the apartment in France that the parties own jointly provided that the said apartment is sold within 6 months from the date of the divorce judgment, failing which sale the Petitioner will pay to the Respondent the said USD.90,000 from his other sources at the expiry of the 6 months aforesaid. Provided further that the Respondent will ensure that her son vacates the apartment within 1 month from the date of the divorce judgment failing which the 5 months which the property should have been sold will be increased by the period that the Respondent's son remains in possession.
7. For the avoidance of doubt, if the apartment is sold as aforesaid the Respondent will in addition to USD.90,000.00 she shall receive as provided for in paragraph "6" above also get another USD.90,000 representing 50% of the apartment as a joint owner.
8. In the event that the apartment is not sold within 6 months as a consequence of which the Petitioner pays to the Respondent the USD.90,000.00 from his other sources as aforesaid, that apartment will remain in the market for sale but in the meantime, the property will be rented out and the rental net proceeds shared equally between the two parties until the same is sold whereupon the sale proceeds will be shared equally.
9. For the avoidance of doubt the USD.90,000 payable by the Petitioner aforesaid will be part of the USD.400,000.00 due and payable.
10. That the balance of USD.100,000.00 will be paid by the Petitioner to the Respondent over a period of six (6) years with effect from 30 days of the divorce judgment at the rate of USD.1,389 per month directly from the Petitioner's pension through a standing order placed with the Petitioner's pension account at U pension system pursuant to this consent order.
11. The Petitioner will maintain the Respondent's health insurance with the U
12. That the household goods will be retained by the Respondent except the pool table which will be kept by the Petitioner within 30 days from the date of the divorce judgment.
13. That the Respondent will keep the Nissan Pathfinder while the Petitioner shall keep the BMW.
14. That the Petitioner shall ensure that his employer, U does procure transportation of the Respondent's personal effects PROVIDED that the Respondent avail all documents and particulars for this purpose and on time, for the lodging of the claim.
15. That each party shall bear their own costs.
16. In default of any of the above amounts as stipulated the same to be recoverable from the Petitioner's pension account at U pension system within a period of 8 years pursuant to this consent order.
17. That these terms of the consent shall constitute the full and final terms of the divorce, maintenance and division of the matrimonial properties thereof and any obligation that arose from the marriage and the Respondent particularly renounces any other claim including all claims in Nairobi High Court Originating Summons Number 17 of 2005 or any other benefits whatsoever from the Petitioner."

Mr. Kattwa's main contention is that there are sufficient new facts and/or grounds to review the consent order due to the fact that the Petitioner's efforts to comply with the consent order are frustrated by the Respondent's acts.

He proffered three grounds, which should be considered by the court. The joint matrimonial flat in France was supposed to be sold and the proceeds of sale was to be kept by the Respondent and the same be credited to the sum of US\$.400,000.00 which was to be payable to her by him. It was also agreed that the rents received on the said flat was to be shared by the party and his share would also be relinquished to her to be included in the total sum payable to her.

None of these agreed issues could be complied as the Respondent's son was occupying the flat and at the moment his girl friend is so occupying. No rent is paid to him and the Respondent has failed to disclose the details of the same. It was further contended that the Petitioner managed to get a purchaser to the flat with agreed purchase price of USD.207,000 but the presence of the girl friend frustrated the said sale.

Further it is submitted that the Petitioner had paid all the outgoings on the flat which was agreed to be shared.

Secondly, it is averred that a motor vehicle purchased by the Petitioner was used by the Respondent with the U.N. Diplomatic Registration Marks. The Petitioner is now retired and the Respondent's refusal, despite requests made, to surrender those registration marks, has resulted in stoppage of his terminal dues.

Lastly, it was submitted that it was agreed that the joint investments were to be discharged. The Petitioner has signed his part of the discharge but the Respondent is refusing to sign the same so that the amounts held in the investment could be paid to her.

With these facts, it is urged that the Petitioner has made sufficient case to seek the review under Section 80 of Civil Procedure Act and order XLIV of the Civil Procedure Rules and it was stressed that the decree in question should be held to be one under order XX Rule 4 to 7 of Civil Procedure Rules.

He has also explained in his replying affidavit sworn on 7<sup>th</sup> April, 2008 that in the judgment given in Divorce Cause the Respondent's behaviour as alleged by him had been accepted and he obtained the order of dissolution of marriage on those grounds. I must hasten to state, however, that I would not put much attention to the evidence as regards dissolution of the marriage as the issues before me are different.

But his averments which explain his inability to raise the cash money are very relevant and I do note them as explained. In paragraphs 9 to 12 of his affidavit sworn on 7<sup>th</sup> April, 2008, these are summarized in Mr. Kattwa's submissions so far addressed hereinbefore.

To support the application to review as filed, Mr. Kattwa submitted on the provisions of Matrimonial Causes Act (cap 152) and attacked the validity of Decree relied upon.

He contended that the decree as issued is a nullity on the grounds that it combines the orders of dissolution and also the consents which also includes a civil case pending between the parties and furthermore, it was emphasized that the Decree Nisi was extracted in exclusion of the petitioner.

The present decree is a decree nisi which should incorporate the decision of the court which was the judgment dated 12<sup>th</sup> July, 2007. That part which is under the Matrimonial Causes Act and contains order No. 1 in the said decree nisi, and which is a formal expression of the adjudication and is not a final decree on the dissolution of the marriage and it was stressed that, that can be achieved only by a decree absolute; though decree nisi can be appealed against as an order. It is also pertinent to note that the decree nisi be submitted without the provisions of order XX of Civil Procedure Rules being followed.

Be that as it may, Mr. Kattwa relied on two Court of Appeal authorities.

**1. Chemigas Ltd. – vs – Bocc (K) Ltd. EALR (2001) I EACA 21. In that case the Court of Appeal**

**found that the omission to put the case number and its omission or incorrectness was a fundamental defect.**

**2. The case of Morgan Holdings Ltd. –v- Mungai and another E.A.LR (1999) (EACAK page 182 is more relevant to the submissions made by Mr. Kattwa.**

The Court of Appeal in the said case differentiated between the terms ‘decree’ and ‘order’. After considering the difference between decree and the order, the Court of Appeal in that case stressed that the format of a decree is separate from that of an order. It is thus contended by Mr. Kattwa that the combining the formal expression of an adjudication (which is the decree nisi) and the consent order in one document is fundamentally defective, and the inclusion of consent order in the decree should be set aside.

Furthering the submissions it was submitted that the concealment of fact in respect of occupation by the Respondent’s son and thereafter by his girlfriend is a material fact which can be considered as the ground for review. It was added that the Respondent did not disclose the fact of the application for review filed by the Petitioner.

The following passage from the case of Kimita –v- Wakiburu (1985) KLR page 317 was cited.

**“The third head under order XLIV rule (1) of the Civil Procedure Rules enabling a party to apply for review for any other sufficient reason” is not necessarily confined to the kind of reasons stated in the two preceding heads in that sub-rule which do not form a genus or class of things analogous to that general head”**

I may further observe that it is a trite law that the party seeking relief should disclose all the material facts to the court and omission to do so, shall result in refusal of grant of the order sought.

In opposition to the Chamber summons dated 10<sup>th</sup> March, 2008 seeking committal to civil jail, Mr. Kattwa submitted that it is totally incompetent, abuse of court process and should be dismissed.

It is averred that the order is not appropriately extracted and Penal Notice required under law did not accompany the order, as well as the order was not served personally on the Petitioner.

It is evident that this Chamber Summons is made under Rules 3(3), 58 and 59 of the Matrimonial Causes Rules and is made by way Chamber Summons. Rules 58 and 59 do permit the application for attachment or committal but no procedure is provided as to its filing and prerequisites. Moreover the Act itself also does not make any provision for such an eventuality. In the premises the court has to fall back on the civil process of committal and if so, as required by such process the leave is not obtained to file committal proceedings. Moreover, it is was brought to the attention of the court that the Note below the Decree Nisi reads as under:

**“NOTE: should the person in whose favour this Decree is issued fail to apply to have the same made absolute within three months from 12<sup>th</sup> August, 2007 then the person against whom this Decree has been obtained may make such application”.**

Below the said note (in the left half portion of the paper following Penal Notice, it is typed – viz;

**“Take Notice that if you the within named Petitioner AA neglected to obey this decree within 14 days you will be liable to process of execution for the purpose of compelling you to obey the same.**

**Dated at Nairobi this 13<sup>th</sup> day of February, 2008.**

**Judy Thongori and Co. Advocate for the Respondent”.**

A quick read or otherwise of the said notice makes it absolutely clear that it is not a Penal Notice to take out committal proceedings. It is simply a notice, of execution and the word execution cannot, with any

stretch of its meaning, include committal of the Petitioner in the civil jail. I also get support for the above observations by the words following the word “**execution**” which are “**for the purpose of compelling you to obey the same**”.

The affidavit of service annexed to the application dated 10<sup>th</sup> March, 2008 also does raise many issues specially in view of the paragraph 4 thereof when he tried to affix the decree on the main gate.

It is not denied that the Respondent is serving as a diplomatic agent and enjoys immunity from civil process except on action relating to (a) his immovable property (b) Succession where he is an executor or Administrator (c) Professional or Commercial activity. The withdrawal of his passport does not come within any of the aforesaid exception and thus this court is not empowered to issue the order sought for, and is thus rejected.

I may add here also that in absence of clear provisions named so far as the civil process of committal is concerned, it shall be difficult for the court to decide whether it can proceed under the provisions of order XXXIX of Civil Procedure Rules or under Section 5 of the Judicature Act. In the case of **Adopt a Light –Vs- Nairobi City Council H.C.C.S. No. 637/06 unreported**) it has been made clear that if the party chooses to apply under either of the said provisions, the process may be different. However, in my view the process of Civil Procedure Rules may not without anything further, automatically apply to the Matrimonial Causes Act, which is a code by itself. In the premises, it is my considered view that the provisions of Section 5 of the Judicature should be made applicable for the purposes of Matrimonial Causes Act (Rules 58).

In view of the premises, I cannot agree with the submissions make by Ms Thongori that substantial justice should be made in the circumstances of the case, I say so, specially in the committal proceedings where the liberty of human being is sought to be taken away.

In view of the premises aforesaid, I do tend to agree with submissions made by Mr. Katwa that the Chamber Summons dated 10<sup>th</sup> March, 2008 is totally incompetent and I dismiss the same with costs.

In answer to the submissions made on the competence of the Chamber Summons dated 26<sup>th</sup> March, 2008, Ms Thongori vehemently argued that the consent order is a part of the Decree as the parties agreed to leave the matter of maintenance to the recording of the consent on the date of judgment, and she added that the consent order was filed. This could be true but the said consent order was not the part of the final judgment. Thus it was not the formal expression of adjudication and it remained in the realm of the order as per its definition in Civil Procedure Act namely; – “**which is formal expression of any decision of the court which is not a decree**”. There cannot be denied that the Decree of the court, so far as the judgment was concerned was the Decree of dissolution of the marriage which has not yet been transformed into a final decree. That decree does not dissolve the marriage but only prohibits another marriage by parties, except that between the parties. It has its own scope and limitation. It has its own form to be adopted in the schedule to the Matrimonial Causes Rules.

Thus the combination of the decree and the consent order which also includes settlement of a pending civil suit is more complex and totally against the well established norms of extracting decree and orders. The forms prescribed under the law are not “**Otiose**” as Court of Appeal held in **Chemigas case** (supra). It is a fundamental defect and a fundamental defect is not something which this court can overlook by exercising its discretion howsoever unlimited it may be. It shall have to be exercised judiciously, with appropriate reasons.

Unfortunately, and with great anxiety, I shall have to find, which I hereby do, that the Decree Nisi extracted and issued on 23<sup>rd</sup> August, 2007 is incompetent and is struck out.

I add that the said application is also improper which is made on concealment of material facts which were and are within the knowledge of the Respondent.

Any application based on the said Decree cannot stand and thus I also struck out the Chamber Summons dated 26<sup>th</sup> March, 2008.

The submissions made by Mr. Katwa on his prayer No.2 to his Notice of Motion are like a double edged sword. The said prayer which is based on the consent order – declared to be inappropriately in the court order and included in the Decree Nisi also cannot be granted. Thus, I allow prayer No.3 on the Notice of Motion dated 10<sup>th</sup> October, 2007 prayed in alternative, and I shall direct that the Respondent or in her failure the Petitioner do comply with all the requisites to give effect to the consent by disclosing all material facts pertinent to both the parties, within 21 days.

I further direct that in view of the aforesaid orders, I shall not comment on the last two affidavits filed by the parties on 22<sup>nd</sup> October, 2008 and 12<sup>th</sup> November, 2008.

I shall not grant orders of costs on application dated 26<sup>th</sup> March, 2008 and 10<sup>th</sup> October r, 2007.

Orders accordingly.

Dated and signed at Nairobi this 29<sup>th</sup> day of January, 2009.

**K.H. RAWAL**

**JUDGE**

**29.1.09**